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Supreme Court, U.S.
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No. 97-738

In The

Supreme Court of the United States

October Term, 1997

CITY OF OMAHA,

Petitioner,

v.

ROYCE DOANE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY

The Petitioner Made No Misrepresentations of Fact

The Eighth Circuit found:

> "Doane's brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include considerations of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA." **App. p. 8**

Contrary to sister circuits, the Eighth Circuit, includes as mitigating factors, subconscious internal adjustments the brain makes to compensate for an impairment; and, contrary to some sister circuits, excludes mitigating factors in assessing whether or not a person is protected by the ADA. As a result it makes no distinction between a disability determination of an impairment that affects a person's vision and the required ADA civil rights determination of an impairment that presents substantial barriers to a person's vision. Thus it destroys the civil rights intent of the Americans With Disabilities Act.

Respondent's opposing brief underscores the need for this Court's guidance in establishing a uniform interpretation of the Americans with Disabilities Act as civil rights legislation. Respondent, following the guidance of the Eighth Circuit, ignores the unanswered trial testimony of its own experts that addressed the civil rights barriers issue, indeed ignores the civil rights issue entirely. Instead, it makes unsupported allegations that the City has made material misrepresentations of fact that Doane's medical experts determined that his vision is not

impaired. Respondent's bare allegation, however, is a misrepresentation in itself requiring the Petitioner to offer to this Court excerpts of the uncontested trial testimony of Doane's experts reviewed by the appellate court.

Dr. Stanley Truhlsen identified Doane's impairment, as medically defined, and concluded that Doane's sight impairment did not prevent him from performing everyday activities. **App. pp. 1-8**

The medical records of Dr. Bares offered by Doane stated: "He appears to have adapted quite well to his status as a one eyed individual and appears to be able to drive and carry out most of his duties without compromise . . . "; "From a functional standpoint, he is not limited in any capacity;" "Again, from Mr. Doane's standpoint, he should be able to perform any task that people with vision in both eyes perform in an equal capacity . . . ;" "Is a jailer at City jail, married, Likes gold, collects antiques, repairs roofs"; " . . . Adapted quite well to his status as a one eyed individual etc. . . . "

Mr. Alfred Marchisio demonstrated that although Doane suffered an impairment to the body as a whole and to his vision, he has not suffered an impairment that substantially interferes with the major life activity of seeing within the purview of the Americans with Disabilities Act of 1990. **App. pp. 8-11**

In an effort to draw the Court's attention away from the gravity of the pivotal point of the mitigation issue, the Respondent, attempted to justify the Eighth's Circuits decision on a separate basis for ADA jurisdiction, "perceived disability." Respondent summarized, out of context, one sentence of the testimony of Omaha Police Chief

James Skinner. Chief Skinner explained in depth why his risk analysis eliminated Doane as a police officer because of his vision impairment and yet allowed him to hire him as a detention technician. **App. pp. 16-25**

The Respondent misrepresents the evidence of the hiring policy of the Police Chief. The Chief's testimony **App. pp. 16, 18, 19** clearly demonstrated that, not only have persons with disabilities been hired as police officers, but also, that as long as a person can perform the essential functions of the entry level police officer position for which he applies, a disability will not be a barrier.

Finally, the Respondent alleges that contrary to Petitioner's statement, Doane offered evidence that he could perform the job of police officer: that evidence being his testimony, and the testimony of Doane's expert, Mr. Marchisio.

The undisputed evidence was that both reemployment and initial hiring of a police officer required successful completion of an extensive testing process, which included a written examination, physical examination, psychological examination, medical examination and background examination.

Mr. Marchisio testified that he based his opinion on an interview with Doane that lasted about one and half hours on July 19, 1995, and documents provided by the Respondent.

Doane's testimony was based on his experience over 10 years prior to the date of trial. Evidence of past

performance is not competent on the issue of future performance in a safe manner. *EEOC v. Amego, Inc.* 110 F.3d 135 (1st Cir. 1997). Doane presented no competent evidence that he could pass the examinations, or safely perform the job of a police officer. **App. pp. 11-14**

THE CIRCUITS ARE SPLIT

Respondent asserts that the Petitioner's position that the Circuits are split is frivolous and seeks damages pursuant to Rule 42(2) of the Rules of the Supreme Court. We can offer no response better than the Sixth Circuit's analysis after its observation of the courts' division. **App. pp. 26-27**

CONCLUSION

Mr. Doane's trial testimony was that his vision impairment did not limits his ability to perform major life activites, including seeing. **App. pp. 14-16**

> Q. And have you foregone any of those endeavors based upon the fact that your sight has left you in the left eye?
>
> A. No.
>
> * * *
>
> Q. Anything that you don't do because of your vision limitation, sir?
>
> A. Not that I can think of.

If Mr. Doane sought relief pursuant to the Americans With Disabilities Act in the First, Seventh or Fifth Circuits, he would certainly be denied. Those circuits would indeed find, based on Doane's testimony alone, that his vision impairment did not rise to the level of a civil rights barrier. If he sought relief in the Eighth, Sixth or Eleventh Circuits, he most certainly would be successful. The different result turns on one single pivoting question, to wit: whether the Circuit includes the effects of mitigating measures in its analysis of whether a substantial limitation of an impairment exists. For the reasons stated in the Petition and in this Reply, we respectfully request that writ of certiorari be granted.

Respectfully submitted,

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Excerpts of the trial testimony of Doane's Medical Expert Dr. Stanley Truhlsen.

Q. Doctor, do you have an opinion based on reasonable medical probability as an ophthalmologist as to whether at all times material herein Royce Doane, based on the diagnosed condition of his left eye and the condition of his right eye, had a physical impairment that affected a major life activity of life?

A. Yes.

Q. And what is your opinion in that regard?

A. Well, my opinion is that he has a disability, a visual disability.

Q. And, Doctor, do you have an opinion as to whether that disability substantially limits a major activity of life such as seeing?

A. Yes.

Q. And what is your opinion in that regard?

A. My opinion, it does limit.

Q. And did you consult or review any source material in reaching that opinion?

A. Yes, I did.

Q. And what material is that, Doctor?

A. Well, I used the material that's been developed by the American Medical Association to determine that disability in cases of partial or complete loss of vision in one or both eyes.

* * *

Q. Doctor, the Americans with Disabilities Act has a further phrase or definition which must be dealt with and that's the term "physical impairment". And I'm going to ask you to assume that the law defines a physical impairment as a physiological disorder or condition affecting one or more of the following body systems: neurological, musculoskeletal, sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. Do you have an opinion based on reasonable probability as an ophthalmologist at all times material herein as to whether Royce Doane, based on your examination of medical records, had a physical impairment within the meaning of that definition?

* * *

A. All right, he does, yes.

Q. And what is your opinion in that regard?

A. My opinion is he has a disability.

Q Would that be with respect to specifically a sense organ?

A. A visual disability.

Q. Doctor, the law finally provides some guidance in terms of what is meant by the term "substantially limits", and I'm going to ask you to assume the law's phraseology in this regard. The term "substantially limits" means that the individual is unable to perform a major life activity that the average person in the general population can perform or the individual is significantly

restricted as to the condition, manner, or duration under which he can perform a major life activity as compared to the manner in which the average person can perform it. Assuming that definition, Doctor, do you have an opinion based on reasonable medical probability as an ophthalmologist as to whether Royce Doane at all times material herein based on your examination of the medical records had a condition which substantially limited his ability to perform a major life function?

A. Yes.

Q. And what is your opinion in that regard?

A. Well, he has a disability.

Q. And would he have a disability and a limitation different than the average person in the general population?

A. Yes, but if you can't see with one eye, you have a disability.

Q. Now, Doctor, would you explain to the jury the effect of his being a one-eyed individual on his ability to see peripherally?

* * *

A. People who have one eye make an adjustment in their ability to orient space and perception so that they tend to compensate with that loss by altering eye position and altering head position and using clues and adjustments that a two-eyed person doesn't have to do.

Q. What are these clues?

A. Well, there are various clues that an individual subconsciously learns. When you're using one eye only, you have a perception of space. For instance, you can tell whether a human being is large and looming before you, is close, or whether he appears to be smaller, and therefore, more distant. That gives you a sense of depth. You can have a clue as to change in contours or distances that overlap. You can have a change in what we call parallax. that's the judgment by which you change the position of your eye or triangulation, you might say, to adjust from here to here such as a child having a baseball thrown to him. If he's only one-eyed, he can learn to adjust to catch that ball. So this comes as some amount of untaught but natural evolution in a patient. The apparent size of objects I mentioned, so these are clues of light, space, depth, size that people tend to learn; and they tend to learn about their peripheral vision in the sense of turning their head and adjusting to compensate for what they don't have.

Q. Doctor, has Royce Doane been required to make certain modifications because of his blindness to his left eye in order to function?

A. Yes.

* * *

Q. And based upon your examinations of Royce Doane and your knowledge of Royce Doane as a patient and your expertise as an ophthalmologist, has he been able to make the modifications to overcompensate for this loss of vision?

A. Insofar as I know of his activities, he has.

* * *

Q. Doctor, the term "substantially limited" in the Americans With Disabilities Act, as I indicated to you earlier, refers to a determination that the individual's unable to perform a major life activity that the average person in the general population can perform; do you recall that?

* * *

Q. Doctor, is he also limited in the manner and method by which he functions as compared to the general population?

A. Well, that depends on his ability to adapt, of course, and I – his adoption – his ability to utilize these things that I just mentioned allows him to do certain things, but he still has that underlying disability.

Q. Would he have to, for example, develop a tendency to turn his head almost subconsciously more so than a member of the average public to gain peripheral vision as a two-eyed individual?

A. Yes.

Q. Doctor, with respect to the condition that you've diagnosed and your treatment of the patient and the examination and the tests you performed, have you made a determination as to whether he has depth perception?

A. I think he has depth perception in the sense that I just described his using of clues and various parallactic things.

Q. In other words, if you throw a softball at him, he can –

A. Shoot a basket, catch a ball, drive a car.

Q. A football?

A. Football.

* * *

THE COURT: Cross-examination.

MS. LONG: Yes, sir.

* * *

Q. But isn't it – with respect to – let's just take near and far because that's what we're looking at with the depth perception, is judging near and far; is that correct?

A. Depth perception, uh-huh.

Q. Okay. Besides indicating that one object is larger than another, an object is smaller than another, how does that apply with depth perception?

A. Well, that is only one element of judgment of depth, and if you have – if you have a person standing here and another one down the hall, the size of those people indicates a different depth. So depth perception depends on so may different intrinsic functions of the brain and interpretation that none of these stand alone, of course, they all function together.

Q. Is it accurate to say that in order to have accurate depth perception, based on these clues, you would have to be familiar with the objects that you're reviewing, how they stood in relation to each other?

A. No, I don't think – familiarity helps certainly, but I don't know that it's a requirement.

* * *

Q. And what I'm saying, sir, is, as you're making this constant survey to compensate for loss of a degree of peripheral vision, as you make this survey, when you turn your head, you are losing peripheral vision on this side?

A. Yes, you'd have to.

Q. Okay. And if a person has diminished peripheral vision, no matter how they turn their head, they're always going to be losing peripheral vision either from the side that is affected or the side that is not affected?

A. They have – I guess we might say for that instant in time.

* * *

Q. All right sir. Now, you were speaking to the definition of disability and you were saying that a person has a sight impairment or physical impairment when that substantially limits the major activity of seeing. I think that's what you were saying. Now, have you ever discussed how Mr. Doane personally is limited in seeing? Did you ever discuss that with Mr. Doane?

A. With him?

Q. Yes, sir.

A. Well, I guess not so much discuss with him, implied, when he was working at his job, he had this problem and he would come in for follow-up and there was never any indication, anything that he told me that he was having a problem in carrying out what his duties were.

* * *

A. When I saw him originally – well, I saw him throughout those years, I was not aware that he was having a visual problem in maintaining his life-style, his daily activity.

Q. See, that's what I'm asking. Did Mr. Doane ever tell you while you were trying to diagnose him, did he ever tell you that he was having any problems doing anything that he's ever done?

A. I don't recall that he told me that he had problems.

Q. So your opinion that Mr. Doane is suffering from a physical impairment that substantially limits seeing is just based on that clinical determination that you read out of your book; isn't that correct?

A. My opinion based on what's in the book is anybody that's blind in one eye has some disability.

Q. But with respect to Mr. Doane, you haven't had any conversation with him on how that – how his ability not to see in one eye impacts his daily activities; have you?

A. No, not that I recall.

* * *

Excerpts of trial testimomy of Plaintiff's vocational rehabilitation specialist Alfred Marchisio

Mr. Alfred Marchisio demonstrated that although Doane suffered an impairment to the body as a whole and to his vision, he has not suffered an impairment that

substantially interferes with the major life activity of seeing within the purview of the Americans with Disabilities Act of 1990.

A. Yes.

Q. And in your opinion, given that opinion, is he disabled by definition under the terms of the American's With Disabilities Act?

A. He's disabled under the Americans With Disabilities Act because he does not have full vision in the left eye.

Q. The American's With Disabilities Act provises that there must be some substantial impairment in one of life's major activities; is that correct?

A. Yes.

Q. And which of Mr. Doane's major life activities is substantially impaired in your opinion?

A. The life activity that's impaired, once again, goes back to the fact that his vision is not normal compared to you and I.

Q. I understand that. What of life's major activities are substantially impaired as a manifestation of that vision problem?

A. I would say at this point his life activities – he has accommodated himself for his major life activities such as performing household chores, gauging depth perception as he would do a household chore like most of us do. Those things are not interfered with. He has made accommodations or adjustments over time.

Q. So do I understand your opinion to be that in your opinion, none of Mr. Doane's major life activities are substantially impaired as a consequence of his vision problem?

* * *

A. In my opinion, he was impaired initially and he's made adjustments subsequently.

Q. In 1995 in your opinion is Mr. Doane substantially impaired in any major life activity?

A. No, other than the fact that he has the visual defects.

Q. And that's the defect. Now, what major life activity is impaired by that defect?

A. At this point he tells me he's able to recreate and perform household chores and most things that all of us can do, so I've not been able to identify anything in that area.

Q. So the answer in short terms is none; is that correct, sir?

A. Yes.

Q. Mr. Marchisio, Mr. Whinnery asked you if Mr. Doane had a substantial impairment concerning a major life activity; do you recall that questioning?

A. Yes.

Q. Are you familiar with the provisions of the Americans with Disabilities Act that define major life acts as including the activity of seeing?

A. That's part of it, yes.

Q. Do you have an opinion as a vocational consultant as to whether or not the major life activity of seeing by Royce Doane has been substantially impaired?

A. Yes, I have an opinion.

Q. What is your opinion in that regard?

A. My opinion is, relying on Dr. Truhlsen and Dr. Bares and Dr. Crossman, that he is impaired.

Q. He is impaired?

A. Yes.

Excerpts from the the trial testimony of Plaintiff Royce Doane

Q. Mr. Doane, you had testified that you had been involved in motor vehicle pursuits during your career as a police officer. Did I hear that testimony correctly?

A. Yes.

Q. And did you indicate the frequency with which you were involved in motor vehicle pursuits?

A. No, I did not.

Q. How frequently was that back in your time frame, let's say from '80 to '84, the last third or half of your employment?

A. Pretty rare.

Q. Your deposition was taken, was it not, back on September 1 of 95', not too long ago?

A. Yes.

Q. And you were placed under oath?

A. Yes.

Q. And didn't you indicate in your deposition – and I'll be referencing page 43, line 23, were you engaged in pursuits from '80 to '84? Answer: None notable. We chased drunk cars down a few blocks, but I didn't chase misdemeanors. Do you recall that question and that answer, sir?

A. Yes.

Q. And when you say none notable, I take it you mean nothing beyond a two- or three-block pursuit, at least in the '80 to '84 time frame; is that right?

A. Nothing that would make an impression on your mind that you could recall later. Certain incidents leave greater impressions.

Q. Is a long-term pursuit – now, by long-term I'll say more than eight blocks, a mile – in an emergency situation a dangerous undertaking for an Omaha police officer?

A. Yes.

* * *

Q. Would you agree with this: That while you're driving, chasing somebody that doesn't want to stop at any given point in that pursuit, you have a wedge of vision that is 20 percent less than a two-eyed police officer?

A. Yes.

Q. Have you – and let's again use the frame of reference of the last third or so of your career, '80 to '84 – been involved in crowd situations where people were engaged in assaultive behavior towards you where you had to keep an awareness of activity that was on either side plus what was in front of you for your own safety and the safety of other officers?

A. I don't recall any.

Q. If that were part and parcel of the police officer's lot in life in 1995, would you be of the opinion that you would be able to be aware of a little bit less of that activity in your field of vision than an officer with sight in two eyes?

A. Possibly.

Q. If officers were to testify that they have been involved in situations like that where they just caught a flash of something out of their peripheral vision and were able to protect themselves against a brick or rock or club, is there anything in your practical experience that would say that's baloney, that testimony has to be made up?

A. Experience officers use their peripheral vision.

Q. Use it, sir?

A. Yes, they use it.

* * *

Q. Let me be more specific. Do you have any hobbies, sir?

A. Yes.

Q. What are those?

A. Golf, Fishing, tools.

Q. And how long have you had those hobbies, sir?

A. Oh, I've golfed since I was ten, fished since I was five, fixed things since I was six.

Q. I seem to recall reading that you played golf also.

A. Golfed since I was ten.

Q. And have you foregone any of those endeavors based upon the fact that your sight has left you in the left eye?

A. No.

Q. No?

A. No.

Q. Are there any social activities that you would like to engage in or indulge in but you don't because of the vision problem? Do you go to movies on occasion if you're included?

A. Yes.

Q. Watch television?

A. Yes.

Q. Read?

A. Yes.

Q. Anything that you don't do because of your vision limitation, sir?

A. Not that I can think of.

Q. And you had mentioned handyman as being one of your hobbies and maybe a slight vocation to hopefully make a dollar here and there doing that; is that right sir?

A. Yes.

Q. What type of handyman work do you do, sir?

A. I live in the middle of a trailer park with 400 families. Many of those families are single, elderly people; and I help them when they ask, mow the yard, fix a leaky faucet.

Q. Do you have any difficulty because of your vision – and my questions are being focused on a vision problem. Do you have any problems caring for yourself or attending to your own needs because of that problem, sir?

A. No.

Q. You had indicated that you have contests going with your wife as far as using the treadmill so I take it you don't have any problems walking –

A. No.

Q. – or ambulating or even running if you feel like it; is that right?

A. That's correct.

Q. Do you have any hearing problems you think adversely affect or impact your ability to engage in normal pursuits that you care to engage in?

A. No.

Q. Your speaking is obviously quite good, well above average; would you agree with that, sir?

A. Thank you.

Q. Do you have any learning problems or breathing problems, any problems other than your vision that –

A. No.

Q. – really impact on your ability to live life to its fullest?

A. No.

Excerpts of the trial testimony of Chief James Skinner

* * *

A. As chief of police, I have a role in the employment of anyone who's hired for the police department.

Q. Do you recall since the adoption of the ADA in 1990 as to whether the police division has employed a sworn police officer who has had a physical condition or handicap?

* * *

A. Mr. Dowd, to the best of my recollection in my five and a half years as police chief, I think I've hired about 200 police officers.

Q. All right.

A. I seem to have a vague, some recollection of very recently hiring a recruit applicant who had diabetes. Now, that's – now, we're talking people hired. They are cases over the years, this health problem and that health problem, that we did not hire the individual but – hiring that one that comes to mind is with diabetes.

Q. With the positions you've identified that Mr. Doane would have been able to have performed with his visual limitations, why was he not hired and given the opportunity to work in those positions?

A. Again, because of our position or our position that we had a limited number of positions that were available that we anticipated that those number of positions would only be reducing as we went forward in the civilianization process and that we had an obligation to look at those people who were already employees of the police department, but not to hire those individuals who already had those severe problems that would not initially qualify them for all aspects of police work.

Q. From your answer, then, so that we are really understanding each other, as I understand it, because of your desire to provide positions for already employed police officers who sustain a physical limitation or handicap, it was your policy as chief of police in the time frame at least from August of '92 through July of '93 not to employ as sworn police officer, an individual who, because of physical limitations, would have required some job modification?

A. No. that's not true. Because of this particular individual with this particular problem, there may have been a host of individuals with one health problem or another covered by the ADA and that a reasonable accommodation perhaps could be made for entry-level police officers. but the decision on this individual, because of the nature of the problem, was that an entry-level officer, which is what he would be considered and

would be, that it would not be an individual we would hire.

Q. Even though he could perform some of the positions that were available?

A. That's correct.

Q. With respect to some other individual that you may consider hiring that had defects or handicaps or physical conditions other than visual limitations, if you were to hire them and place them in a modified job, how would you be enhancing your ability to keep modified jobs available for current officers that experienced physical limitations and handicaps.

A. I wouldn't do that. I wouldn't hire someone that has to be placed in a modified position.

Q. Let me go back again because I think we're misunderstanding each other. It is your position, as the chief of police, within the period of August '92 through July of '93 that you would not employ an individual who had a physical condition or limitation or handicap which would require their placement in a modified job position with the Omaha Police Division?

A. I would not hire them. If they were already a member, I would make accommodations.

Q. If they weren't a member of the force, you wouldn't make accommodations?

* * *

A. I would not hire a person who would need an accommodation for a modified position. If there was some type of – if there was some type of – whether it be

treatment of – and I'm trying to span the whole gamut of physical conditions that one might encounter, if there was some type of treatment or device or what have you that a person could undergo or work with, live with, and be able to function fully as an entry-level police officer in a variety of situations, then I believe the federal law requires us to then not let that be the reason not to hire the person. But to hire someone knowing that they could not be utilized in the full entry-level capacity, that they would forever need a modified position, that I would not do.

Q. And that's basically why you decided not to hire Royce Doane and place him in a position that would require some modifications?

A. That's correct.

Q. The position of detention technician, do you know whether or not at one time that position was filled by police officers?

A. Yes.

Q. And can you tell me when was it filled by police officers before?

A. It was filled by police officers up until approximately 1982.

Q. And do you know why they changed that position from police officer to civilian?

A. Yes.

Q. Can you explain to the jury why they did that?

A. The police department believed that it was no longer necessary to request sworn officers in that capacity and that there would be considerable cost savings to the city by creating the position of detention technician, hiring people with those skills and allowing them to carry out that function and then transferring the sworn officers from the detention to street patrol.

Q. Now, the detention technician position, does that require a person to make an arrest?

A. No, it does not.

Q. Does it require – does it have instances of personal confrontation?

A. Yes it does.

Q. Does it – can you distinguish between the personal confrontation of a detention tech and the personal confrontation of a police officer?

A. Yes.

Q. Will you do so, please?

A. A detention technician encounters individuals who are already in custody and they have been searched by police officers when they were arrested on the street. They have been searched just prior to being in the jail area and they are searched again at the time of booking; so first of all, there is not a concern for weapons that there would the same level that there is on the street because the person has been or should have been searched three times. They're in a closed environment in which the only other individuals immediately accessible are other police officers or other detention technicians

and an extremely limited amount of prisoners that may be in the immediate area. So the situation of a detention technician encountering a confrontation is significantly different from a police officer encountering a confrontation in a street situation.

Q. Now, where is the detention area located?

A. The detention unit is located in the subbasement of the police headquarters building approximately two floors below ground.

Q. Are there police officers on any of these other floors during a 24-hour period of time?

A. Yes.

Q. Are the doors secured?

A. Yes, they are.

Q. What is your opinion of the risk to the personal safety of a detention tech in one of these confrontations as compared to a police officer?

A. Certainly a detention technician could be injured, but at the same time the risk would be substantially different from that of a police officer because of the uncertainties and the vast number of possibilities that an officer could encounter on the street versus a detention technician encountering in the detention area.

Q. Are there usually police officers in the detention area as well?

A. There frequently are police officers in the detention area.

Q. What is your distinction of the risk to fellow employees in the detention situation as opposed to fellow officers in a police confrontation situation?

A. There is no doubt that a detention technician does face risks. In fact, there have been people injured in the detention area. There's no question about it. At the same time, the risk is not the same as what an officer faces on the street because the dramatic reduction of the possibility of a weapon being brought into the jail area versus officers encountering weapons on the street, also the number of individuals that may come at him versus an officer on the street who may have people come at him from all directions.

Q. Is there a crowd situation at all in the detention area?

A. There's never been one in my 25 years of service.

Q. What is the danger interpretation of the distinction between the amount of risk to the public in a detention situation, confrontation, and the amount of safety to the public in a police confrontation situation?

A. The danger to the public in a confrontation in the detention area would be virtually nonexistent absent, perhaps, a tour of one or two or three members of the public in the detention area, their risk would be virtually zero. The same situation on the street, it's dramatically different because you have all kinds of possibilities for dealing with the public who are passing by whom may live in the area, who are working in the area, who may be nearby but not part of the actual confrontation. The risk

to them is quite great. Also the risk of them becoming involved in the incident substantial.

Q. Were you aware of Mr. Doane's sight limitations in 1992?

A. I know that he had some sight limitations. I did not know the exact extent of those limitations.

Q. Did you know he was blind in one eye?

A. I knew there were significant sight limitations. Again, I did not know the exact nature, but I knew that it was significant.

Q. Were you involved at all in his position for a detention tech and his application for the position of detention technician?

* * *

Q. Will you please identify the exhibit I have just handed to you? It's Exhibit 114, Defendant's Exhibit 114. Will you identify that exhibit?

A. Yes. This is a City of Omaha notice of personnel change form that's routinely used by the city. it's known as a P-19.

Q. And whose notice of personnel change is that?

A. Royce J. Doane.

Q. And what positions are affected?

A. It indicates that this individual is being transferred from the position of communication operator to the position of detention technician II.

Q. What year?

A. This document, the effective date is April 12, 1991.

Q. Were you the police chief in 1991?

A. Yes, I was.

Q. Does that document require your approval?

A. Yes, it does.

Q. Were you aware of Mr. Doane's sight impairment at that time?

A. Yes, I was.

Q. Did you consider Mr. Doane disabled?

A. No.

Q. Can you explain why?

A. Because I felt that he was capable of performing the position of which he was being appointed to, that of detention technician; and the sight limitations that he had, it would not prevent him from performing effectively in that position.

* * *

Q. Now, with respect to his quest to become a police officer, did you consider Mr. Doane to be qualified to be a police officer?

A. No.

Q. Why not?

A. Because of his sight limitations.

Q. And how did that impact on his qualification?

A. It would not make him eligible in mind to apply for the position of police officer.

* * *

Q. Now, when you made the recommendation not to hire Officer Doane, was that recommendation solely limited to the fact that he had no vision in his left eye?

A. Based upon my understanding that his eyesight was extremely limited in one eye, yes.

Q. Currently you consider that a significant limitation –

A. Yes.

Q. – and you regard it as such?

A. Yes, sir.

The Court in Gilday v. Mecosta, 124 F.3d 760 (6th Cir. 1997) observed at 762:

> 1. Whether the Court Should Take the Presence of Mitigating Measures into Account When Deciding Whether a Disability Exists.
>
> In holding that Gilday is not disabled, the district court focused exclusively on how the diabetes impacted on Gilday's life after he had been diagnosed with the condition and had controlled it with medication and proper rest and eating habits. See 920 F.Supp. at 795-96. Under this court's recent decision in McKay, the district court's holding that Gilday's diabetes, when properly treated and controlled, does not substantially impair his ability to work or any other major life activity is correct. See McKay, 110 F.3d at 373.
>
> The EEOC's interpretive guidelines, however, state that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. s 1630 App. 1630.2(j). See also id. s 1630.2(h). The first question that we must address, then, is whether, in determining whether a person is disabled under the ADA, a court should look at the situation when the impairment is controlled by medication or treatment or, as the EEOC suggests, the court should evaluate the impairment without regard to the availability of such mitigating measures. The courts are divided on the question. Compare Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir.1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir.1996); Fallacaro v.

Richardson, 965 F.Supp. 87, 93- 94 (D.D.C.1997); Wilson v. Pennsylvania State Police Dep't, 964 F.Supp. 898, 907 (E.D.Pa.1997); Hendler v. Intelecom USA, Inc., 963 F.Supp. 200, 206 (E.D.N.Y.1997); Shiflett v. GE Fanuc Automation Corp., 960 F.Supp. 1022, 1029 (W.D.Va.1997); Sicard v. City of Sioux City, 950 F.Supp. 1420, 1438-39 (N.D.Iowa 1996) (all explicitly adopting EEOC interpretation over direct challenges), and Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir.1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir.1995); Thomas v. Davidson Academy, 846 F.Supp. 611, 617 (M.D.Tenn.1994) (all using EEOC interpretation without substantial analysis), with Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 & n. 3 (5th Cir.1996) (dicta suggesting disagreement with EEOC view); Schluter v. Industrial Coils, Inc., 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("If an insulin-dependent diabetic can control her condition with the use of insulin . . . she cannot argue that her life is substantially limited by her condition."); Murphy v. United Parcel Serv., Inc., 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting EEOC view as contrary to statute [FN1]); Coghlan v. H.J. Heinz Co., 851 F.Supp. 808, 813-14 (N.D.Tex.1994) (same). As the majority of these courts have held, the EEOC's interpretation of the statute is the correct one.